

MOTION INFORMATION STATEMENT

Docket Number(s): 15-156

Caption [use short title]

Motion for: Expedited Review

Murphy v. Allways East Transportation

Set forth below precise, complete statement of relief sought:

Plaintiff-Appellant seeks an expedited
schedule for briefing, oral argument, and
consideration of this appeal.

MOVING PARTY: Murphy

☐ Plaintiff

☐ Defendant

☒ Appellant/Petitioner

☐ Appellee/Respondent

OPPOSING PARTY: Allways East Transportation

MOVING ATTORNEY: Angela W. Thompson

[name of attorney, with firm, address, phone number and e-mail]

OPPOSING ATTORNEY: Richard I. Milman

National Labor Relations Board

Milman Labuda Law Group PLLC

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Court-Judge/Agency appealed from: United States District Court for the Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):



Yes



No (explain):

Opposing counsel's position on motion:



Unopposed



Opposed



Don't Know

Does opposing counsel intend to file a response:



Yes



No



Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND
INJUNCTIONS PENDING APPEAL:

Has request for relief been made below?



Yes



No

Has this relief been previously sought in this Court?



Yes



No

Requested return date and explanation of emergency:

Is oral argument on motion requested?



Yes



No

(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?



Yes



No

If yes, enter date:

Signature of Moving Attorney:

s/ Angela W. Thompson

Date: February 4, 2015

Service by: ☒ CM/ECF



Other [Attach proof of service]

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PAUL J. MURPHY, Acting Regional Director
for the Third Region of the National Labor
Relations Board on behalf of the National
Labor Relations Board,

Plaintiff-Appellant,

v.

No. 15-156

ALLWAYS EAST TRANSPORTATION, INC.,

Respondent-Appellee.

**NATIONAL LABOR RELATIONS BOARD’S
MOTION TO EXPEDITE APPEAL**

Paul J. Murphy (“the Director”), on behalf of the National Labor Relations Board (“the Board”), respectfully moves this Court to expedite the briefing schedule in this appeal of the district court’s denial of § 10(j) injunctive relief in this matter. It is submitted that expedition of the appeal is warranted due to the statutory priority given requests for injunctive relief, judicially created priority in such cases, and the need for prompt relief posed by the circumstances of this case.

The Director sought § 10(j) relief in district court to require Allways East Transportation (“Allways”) to, *inter alia*, recognize and bargain with the incumbent union that represented its employees while they were employed by a predecessor employer entity. The Director sought this relief pending Board adjudication of unfair labor practice charges against Allways in order to prevent

irreparable harm to employee statutory rights and the union's status, as well as to preserve the Board's ability to issue an effective remedy at the conclusion of the administrative proceedings. The district court denied the requested relief and employees continue to suffer the loss of union representation.

Section § 10(j) is intended as a "swift interim remedy to halt unfair labor practices." *Kaynard v. MMIC, Inc.*, 734 F.2d 950, 954 (2d Cir. 1984). Until 1984, § 10(i) of the National Labor Relations Act ("the Act") provided that "petitions filed under [the Act] be heard expeditiously, and if possible within 10 days after they have been docketed." Public Law 98-620, "The Federal Courts Civil Priorities Act" (FCCPA) repealed § 10(i) and other priority statutes, but it replaced them with a uniform provision, 28 U.S.C. § 1657(a), which requires the courts to ". . .expedite the consideration of. . .any action for temporary or preliminary injunctive relief." Thus, based on the priorities established by the FCCPA, this matter warrants expedited treatment.

In addition, courts have recognized that the very nature of § 10(j) cases qualifies them for expedited treatment independent of the statutory provisions for expedition. In *Fuchs v. Hood Industries, Inc.*, 590 F.2d 305 (1979), for example, the First Circuit held that a § 10(j) petition must be granted priority not solely as a result of the mandate of § 10(j), but because the very nature of these proceedings dictates expeditious judicial consideration. *Id.* at 397 (§ 10(j) was "designed to fill

the considerable gap between the filing of the complaint by the Board and the issuance of its final decision”). *See also Kaynard v. MMIC*, 734 F.2d at 954. *Cf. NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 181 (2d Cir. 1965) (“remedial action must be speedy in order to be effective”).

Further support for the need to expedite consideration of this appeal can be found in the specific facts of this case. The employees here have been represented by the International Brotherhood of Teamsters, Local 445 (“the Union”) since the Union was certified as their collective-bargaining representative on October 28, 2009, following a Board-conducted election held while employees were employed by the predecessor employer Durham School Services (“Durham”). They enjoyed Union representation and the benefits of a collective-bargaining agreement—the first of which became effective in March 2011—for years. Since Allways took over the Dutchess County contract from Durham it has unlawfully refused to recognize the Union, depriving these same employees of their chosen representative. Allways has not engaged in bargaining or otherwise communicated with the Union since it began servicing the Dutchess County contract on April 22, 2014, more than nine months ago. During that period, record evidence demonstrates that at least two employees were terminated without the benefit of representation by the Union. Furthermore, Allways moved its Wappingers Falls facility to Fishkill, New York without giving notice to the Union or an opportunity

to bargain regarding the effects of the relocation, which is a change to working conditions that could have a significant impact on employees.

Allways' refusal to recognize and bargain with the Union chosen by its employees threatens ongoing irreparable harm to the collective-bargaining rights of those employees and the Union's status as their certified representative. *Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 369 (2d Cir. 2001). When a successor employer, like Allways, refuses to recognize the incumbent union that represents its employees, "there is a pressing need to preserve the status quo [of union representation] while the Board's final decision is pending." *Id.* These employees are currently being deprived of the benefits of Union representation by their chosen representative—a loss that cannot be remedied by a Board order in due course—and the predictable loss of employee support for the Union under these circumstances will make it less likely that the Union can effectively represent the employees when the Board ultimately orders Allways to commence bargaining. *See, e.g., Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 299 (7th Cir. 2001); *DeProspero v. House of the Good Samaritan*, 474 F.Supp. 552, 559 (N.D.N.Y. 1978). *See also, Franks Bros. Co., v. NLRB*, 321 U.S. 702, 704 (1944). Thus, the Board's processes may be rendered "totally ineffective" by precluding a meaningful final remedy. *Hoffman v. Inn Credible Caterers, Ltd.* at 369; *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1034 (2d Cir. 1980) (discussing *Seeler v. The*

Trading Port, Inc., 517 F.2d 33, 37-38 (2d Cir. 1975)). Further delay increases the ongoing risk of irreparable harm to the collective bargaining rights of the affected employees, the Union, and the public interest. *See Maram v. Universidad Interamericana*, 722 F.2d 953, 960 (1st Cir. 1983).

Consistent with this, the Director and the district court acted expeditiously in filing and considering, respectively, the petition for injunctive relief. The Director issued an unfair labor practice complaint regarding the underlying allegations on September 30, 2014. Within 30 days, on October 27, 2014, the Director filed the petition for injunctive relief in this matter, requesting an Order to Show Cause returnable at the earliest possible date because of Allways' serious and flagrant unfair labor practices. The hearing before the district court was held on November 12, 2014 and the judgment denying the Director's petition for temporary injunctive relief was entered on December 2, 2014. After careful consideration, the Board determined that an appeal of the decision below was necessary, and a Notice of Appeal was filed on January 20, 2015. Expedited consideration of this appeal of the district court's erroneous denial of injunctive relief is necessary in order to preserve the chance to obtain prompt, effective relief from Allways' unlawful refusal to bargain as a successor employer.

Appellant recognizes that this Court has a heavy calendar. However, due to the need for expedition noted above, we propose the following briefing schedule:

Appellant's opening brief and appendix shall be filed within 30 days of entry of the Order granting the motion to expedite.

Appellee's brief shall be filed within 30 days of the filing of Appellant's brief.

Appellant's reply brief shall be filed within 14 days of the filing of Appellee's brief.

On Monday, February 2, 2015, counsel for the Director communicated via voicemail and email the proposed briefing schedule to Richard Milman, Counsel of Record for Respondent, and inquired whether the motion would be opposed and whether a response would be filed. At the time of this filing no answer has been received.

Respectfully submitted this 4th day of February, 2015.

/s/ Angela W. Thompson
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**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PAUL J. MURPHY, Acting Regional Director
for the Third Region of the National Labor
Relations Board on behalf of the National
Labor Relations Board

Plaintiff-Appellant,

v.

No. 15-156

ALLWAYS EAST TRANSPORTATION, INC.

Respondent-Appellee.

**DECLARATION IN SUPPORT OF
THE NATIONAL LABOR RELATIONS BOARD'S
MOTION TO EXPEDITE APPEAL**

Angela W. Thompson, an attorney duly admitted to practice before the
United States Court of Appeals for the Second Circuit, under penalty of perjury,
declares that the following statements are true and correct:

1. I am an attorney at the National Labor Relations Board (“the Board”) and
am counsel for the Appellant in *Murphy v. Always East Transportation*.
2. I am thoroughly familiar with the petition for an injunction in this matter.
3. Petitions for injunctive relief under § 10(j) are among those types of actions
which Congress has determined require expedited treatment. 28 U.S.C. §
1657(a).

4. Moreover, the courts have recognized that the very nature of § 10(j) proceedings calls for prompt judicial action. Absent swift interim relief, the remedial purposes of the statute may be frustrated. *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1055 (2d Cir. 1980).
5. There has been no bargaining or other communication between Allways East Transportation (“Allways”) and the certified collective-bargaining representative of the employees, the International Brotherhood of Teamsters, Local 445 (“the Union”), since Allways commenced servicing the contract to provide transportation services for special education and preschool children in Dutchess County, New York (“the Dutchess County contract”) on April 22, 2014.
6. Since Allways began operations under the Dutchess County contract, at least two employees have been terminated without benefit of assistance from the Union.
7. Further, the Employer relocated its Wappingers Falls facility to Fishkill, New York without giving notice to the Union or an opportunity to bargain about the impact of the relocation.

Executed on this 4th day of February, 2015

/s/ Angela W. Thompson
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